STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2007
v	No. 265371 Washtenaw Circuit Court
DARRYL LEE JOHNSON, Defendant-Appellant.	LC No. 04-001372-FH

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 730.110a(2). The trial court sentenced defendant as an habitual offender, MCL 769.12, to twelve to twenty years' imprisonment. Defendant appeals as of right. We affirm.

On August 16, 2004, just before 5:00 a.m., defendant entered Melissa Lutz's apartment in Ann Arbor. Hearing a stranger in her apartment, Lutz called 911. Police officers arrived at Lutz's apartment while defendant was still inside the apartment. They arrested defendant when he walked out of the apartment.

Defendant argues that he was denied the effective assistance of counsel when his counsel failed to make two objections at trial. Because defendant failed to move for a new trial or for a *Ginther*[1] hearing, our review of defendant's claims is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To prevail on a claim for ineffective assistance of counsel, "a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). A defendant must also prove that his counsel's deficient performance was prejudicial to the extent that "but for counsel's error, the result of the proceedings would have been different." *Id.* Counsel is presumed to have provided effective assistance, and the defendant bears a heavy burden to prove otherwise. *Id.*

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant first argues that he received ineffective assistance of counsel when counsel failed to object to the admission of the recording of Lutz's 911 telephone call. Defendant argues that the admission of the recording violated his right of confrontation as it contained testimonial statements. In a criminal prosecution, a defendant has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A testimonial statement by a witness absent from trial is barred unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford, supra* at 59, 68. The United States Supreme Court has made the following distinction between testimonial and nontestimonial statements given in response to interrogation by law enforcement officers:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Davis v Washington*, __ US __; 126 S Ct 2266; 165 E Ld 2d 224 (2006).]

See also *People v Walker (On Remand)*, ___ Mich App ___; ___ NW2d ___ (2006).[2]

The circumstances surrounding Lutz's 911 telephone call objectively indicate that the purpose of her statements to the 911 operator was to obtain police assistance to meet an ongoing emergency. As in *Davis v Washington*, __ US __; 126 S Ct 2266; 165 E Ld 2d 224 (2006), Lutz was relaying events to the 911 operator as the events were happening. As Lutz was talking to the 911 operator, defendant was moving around in her apartment. Because defendant, a stranger, was in her apartment and none of her roommates were present, Lutz was facing an emergency. It is clear that Lutz's 911 telephone call was "a cry for help." In addition, Lutz's statements to the 911 operator were necessary for the responding police officers to resolve the emergency. The officers needed to know where defendant was in the apartment, any identifying features, and whether he should be in the apartment. Finally, Lutz's interrogation lacked a level of formality. The whispered statements of Lutz, who was crying, were provided over the telephone in an unsafe environment. Accordingly, Lutz's statements were not made to establish or prove past event, but were made to enable police assistance to meet an ongoing emergency and thus were nontestimonial. See *Davis*, 126 S Ct at 2273-2274, 2277.

Because Lutz's statements to the 911 operator were nontestimonial statements, the admission of the recording of Lutz's telephone call did not violate defendant's right of confrontation. *Davis, supra* at 2277-2278. Therefore, any objection to the admission of the recording on this basis would have been futile. Because counsel is not ineffective for failing to make futile motions or objections, *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998), defendant was not denied effective assistance of counsel when counsel did not object to

[2] Published opinion of the Court of Appeals (Docket No. 250006, issued 11/21/06).

the admission of the recording of Lutz's 911 telephone call on the basis that it violated defendant's right of confrontation.

Second, defendant argues that he received ineffective assistance of counsel when counsel failed to object to the following opinion testimony of Officer McNally:

> I determined that the house was actually entered illegally, that the person that we found in the house was not supposed to be there, that the crime took place of items being removed from the house and that there was intent from the suspect to commit the crime.

Defendant argues that McNally's testimony violated MRE 701, which requires that opinion testimony by lay witnesses be based on the witness's own perceptions. We agree. There is no evidence in the record to suggest that McNally's opinion testimony was based on his own perceptions. He found no signs of forced entry and testified that he could not determine how defendant entered the apartment without speaking to Lutz. He did not see other officers search defendant and remove items belonging to one of Lutz's roommates from defendant's pockets, nor did McNally hear defendant make any incriminating statements. Because McNally's opinion testimony was not based on his own perceptions, his testimony was not admissible pursuant to MRE 701. See *Miller v Hensley*, 244 Mich App 528, 530-531; 624 NW2d 582 (2001).

Nevertheless, defendant has failed to demonstrate the requisite prejudice. The required elements were amply established by defendant's statements at the scene and Sharma's testimony. We are satisfied that McNally's opinion testimony did not affect the trial's outcome.

Defendant also argues that he was denied effective assistance of counsel when counsel failed to file any pretrial motions. Defendant asserts that counsel, by not filing any pretrial motions, failed to subject the prosecution's case to any adversarial testing and he is, therefore, entitled to a presumption of prejudice and to relief from his conviction.

In *United States v Cronic*, 466 US 648, 658-659; 104 S Ct 2039; 80 L Ed 2d 657 (1984), the Supreme Court noted that a defendant claiming he was denied effective assistance of counsel need not show that he was prejudiced when counsel entirely failed to subject the prosecution's case to adversarial testing. Counsel's failure must not only be complete, but counsel's alleged errors must not be "of the same ilk" as errors that are subject to the prejudice requirement. *Bell v Cone*, 535 US 685, 697-698; 122 S Ct 1843; 152 L Ed 2d 914 (2002). Defendant does not argue on appeal that his counsel failed to oppose the prosecution's case through the entire pretrial proceedings. Rather, defendant argues that counsel failed to do so at specific points, specifically when counsel failed to file pretrial motions. Thus, there was not a complete failure by counsel in this case. Moreover, our review of caselaw reveals that we routinely require defendants who claim that counsel was ineffective for failing to file pretrial motions to show that counsel's failure resulted in prejudice. Therefore, we conclude the alleged error is "of the same ilk" as other errors subject to the prejudice requirement. For these reasons, defendant is not entitled to a presumption of prejudice under *Cronic, supra*. And, defendant has not argued or demonstrated prejudice. He has not proved his claim of ineffective assistance of counsel.

Defendant finally argues that the trial court erred in allowing the late endorsement of the 911 operator as a witness. We review a trial court's decision regarding the late endorsement of a witness for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813

(1995). To establish that a trial court abused its discretion in allowing the late endorsement of a witness, the defendant must demonstrate that the trial court's ruling resulted in prejudice. *People v Callon*, 256 Mich App 312, 327-328; 662 NW2d 501 (2003).

Not less than 30 days before trial, the prosecutor shall send to the defendant or his attorney, a list of the witnesses the prosecutor intends to produce at trial. MCL 767.40a(3). A prosecutor may add or delete a witness from this list at any time upon leave of the court and for good cause shown or by stipulation of the parties. MCL 767.40a(4). On the record before us, we find that the prosecutor did not have good cause to endorse the 911 operator on the second day of trial. The prosecutor knew for several months before trial that he would not be able to call Lutz as a witness. Therefore, it should have been obvious to the prosecutor before trial that he needed to endorse the 911 operator to authenticate the 911 tape containing Lutz's statements. See *People v Herndon*, 246 Mich App 371; 633 NW2d 376 (2001).

However, defendant was not prejudiced by the prosecutor's late endorsement of the 911 operator and is not entitled to reversal on that ground. Defendant does not argue that he was surprised by the prosecutor's request to play and to admit the recording of Lutz's 911 telephone call. Given the requirement for authentication or identification of evidence, see MRE 901, defendant should have known that the prosecutor would need to call someone at trial to authenticate the recording of Lutz's 911 telephone call. The 911 operator's testimony did no more than verify the contents of the recording. Thus, while the source of the testimony to authenticate the recording of Lutz's 911 telephone call may have been a surprise to defendant, the contents of the testimony was not. See *Herndon, supra* at 403. Thus, defendant has failed to establish that he was prejudiced by the late endorsement of the 911 operator. *Id.*

Affirmed.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Stephen L. Borrello